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No. 93-723

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA

Petitioner,

v.

X-CITEMENT VIDEO, INC., & RUBIN GOTTESMAN

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE LAW AND LINGUISTICS CONSORTIUM IN SUPPORT OF RESPONDENTS

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June 8, 1994

9 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

CONCLUSION 7

INTEREST OF AMICUS CURIAE

The Law and Linguistics Consortium is a recently formed association of lawyers and linguists interested in applications of linguistics to legal problems. Its founding members are: Clark D. Cunningham, Professor of Law, Washington University; Georgia M. Green, Professor of Linguistics, University of Illinois (Urbana-Champaign); Jeffrey P. Kaplan, Associate Professor of Linguistics, San Diego State University; Judith N. Levi, Associate Professor of Linguistics, Northwestern University; and Lawrence M. Solan, Partner, Orans, Elsen and Lupert, New York City.[1] One goal of the Consortium is to make available to courts faced with questions of statutory interpretation information about how a statutory provision would be understood as a matter of ordinary language. All five current members of the Consortium actively participated in preparing the linguistic analysis presented in this brief.

The Consortium members have no relationship with any party or counsel in this case, no personal interest in the outcome of the case, and no particular position on the issue of child pornography. This brief is filed in support of Respondent only because the Consortium's analysis of the statutory provision is consistent with the analysis of the court below, which ruled in Respondent's favor. [2]

[1] The Consortium has its origins in Solan's publication of The Language of Judges (1993) in which Solan combined his academic training in linguistics and his experience as a lawyer to discuss a wide range of cases in which judges appear to be engaged in linguistic analysis. In the course of reviewing Solan's book for the Yale Law Journal, Cunningham, Levi, Green and Kaplan analyzed three cases from the 1993-94 Supreme Court term while the cases were still pending, and provided the Court and counsel with galley proofs prior to oral argument. See "Plain Meaning and Hard Cases," 101 Yale L. J. 1561, 1562 n. 2 (1994). The article's analysis was cited by the majority opinion in United States v. Granderson, 411 U.S. ___,____, 114 S.Ct. 1259, 1267 n. 7 (1994) and by the concurring opinion in United States v Staples, 411 U.S.___,___, 62 USLW 4379, 4386 (1994)(Ginsburg, J. concurring with O'Connor,J.).

SUMMARY OF ARGUMENT

The court of appeals correctly interpreted the language of 18 U.S.C. 2252 according to principles of standard English when it held that this statutory provision does not require that the defendant know that the materials in question depict minors engaging in sexually explicit acts. The statutory language is not ambiguous as to this issue.

ARGUMENT

The linguistic issue presented in this case is whether, in 18 U.S.C. 2252(a), the adverb *knowingly* can be understood to modify the *if*-clauses that follow it.

18 U.S.C. 2252(a) can be edited to reveal its structure as follows:

(1) (a) Any person who--

(1) knowingly transports...any visual depiction, if--
(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
and
(B) such visual depiction is of such conduct;

or

(2) knowingly receives...any visual depiction

[2] The parties have consented to the filing of this brief *amicus curiae* and letters memorializing their consent are being filed with the Clerk of the Court concurrently with the filing of the brief.

or

> knowingly reproduces any visual depiction..., if--
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> and
> (B) such visual depiction is of such conduct;

shall be punished...

To facilitate discussion of this very complex sentence, we will compress its content into a shorter version in the following way.

- Let "TRANSPORT" stand for any of the relevant verbs in the statutory sentence: *transports*, *ships*, *receives*, *distributes*, *reproduces*.
- Let X stand for *a visual depiction*
- Let Y stand for *the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct*.

Using these abbreviations, the statutory sentence can be further abbreviated to the following:

(2) Any person who knowingly TRANSPORTs X, if producing X involves Y, shall be punished.

The linguistic issue is whether the statutory sentence can legitimately be interpreted as having the meaning expressed in (3):

(3) Any person who knowingly TRANSPORTs X, and knows that producing X involves Y, shall be punished.

Put another way, the question is whether in (2) the *if*-clause is part of what is modified by *knowingly*, or outside of what is modified by *knowingly*.[3] Thus, in (4), *knowingly* combines with the verb phrase *transported a videotape* to form the verb phrase *knowingly transported a videotape*, in which *knowingly* modifies the interior verb phrase *transported a videotape*.

(4) [S [NP Jones] [VP [ADV knowingly] [VP transported a videotape]]][4]

Following the decision of the Ninth Circuit in this case, a number of other circuits have disagreed with its reading of the textual language, asserting either that the provision is ambiguous as to whether *knowingly* modifies the if-clause or even that *knowingly* clearly modifies the if-clause. See United States v. Cochran, 17 F.3d 56 (3rd Cir. 1994), United States v Gendron, 18 F.3d 955 (lst Cir. 1994); United States v. Colavito, 19 F.3d 69 (2d Cir. 1994).

The appellate opinion most directly opposed to the decision below is that of the Third Circuit in Cochran, which concluded that the textual language of "Section 2252 mandates knowledge of the nature and contents of the proscribed materials" 17 F.3d at 60 (emphasis added). Significantly, in reaching this conclusion, the Cochran court rewrote Section 2252, not only omitting the key word "if" but also changing "involves the use of a minor" to "involving

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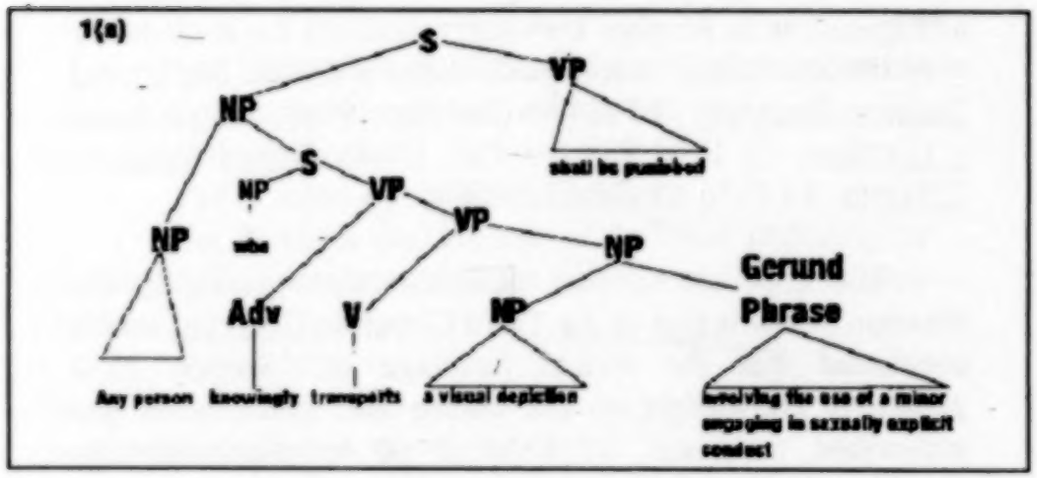
[3] Modifiers are syntactic elements which combine with elements of a certain type to form elements of that same type. See, McCawley *Everything that linguists have always wanted to know about logic*, 2nd ed. (1993) at 17.

[4] In this and other diagrams, we use standard linguistic notation to indicate syntactic categories, as follows: S=sentence, NP=noun phrase, VP=verb phrase, ADV=adverb.

the use of a minor."[5] The Cochran court rewrote the statute to read as follows:

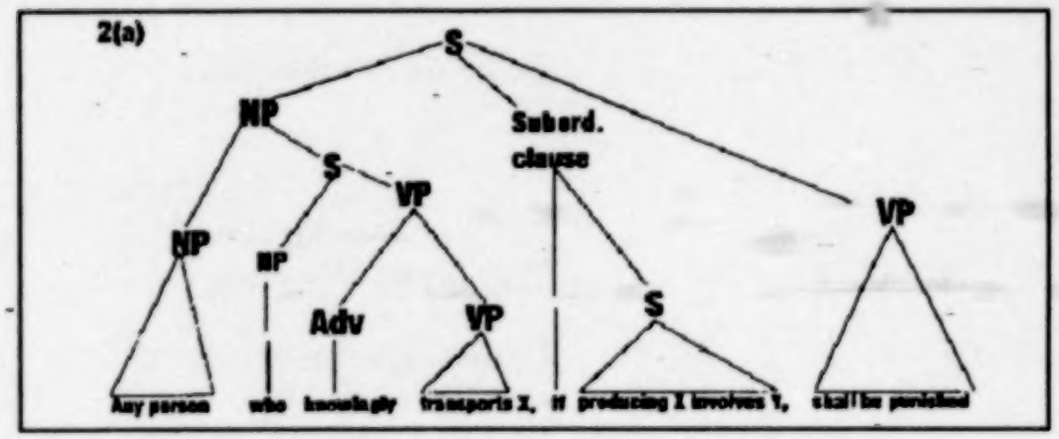
(5) Any one who knowingly transports a depiction involving the use of a minor engaging in sexually explicit conduct shall be punished.

The expression *involving the use of a minor engaging in sexually explicit conduct* is an example of a gerund phrase. Unlike the *if*-clause, this phrase is part of the verb phrase that includes *knowingly*, as shown by the following diagram.



[5] "Similarly, § 2252(a)(2) provides that "any person who knowingly receives...any visual depiction...involv[ing] the use of a minor engaging in sexually explicit conduct" shall be criminally liable." 17 F.3d at 59.

In contrast to the "involving use of minor" gerund phrase, the *if*-clause in the actual statute is not part of the verb phrase modified by *knowingly* , as shown by the following diagram that corresponds to sentence (2) above.



The parenthetical *if*-clause is outside of what *knowingly* modifies. Consequently, the syntactic structure of the sentence does not allow it to be interpreted as if *knowingly* modified *producing X involves Y*.

CONCLUSION

The sentence in the statute requires knowledge of the act of transportation and arguably knowledge that the object transported is a depiction. However, as a matter of standard English, the statute as written simply can not be interpreted as if it meant

> Any person who knowingly TRANSPORTs X, and knows that producing X involves Y, shall be punished.

The fact that some courts seem to have so read the sentence can be attributed to the confusion caused by the peculiar placement of the *if*-clauses and the overall unwieldy length of Section 2252(a).

Respectfully submitted,

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